Central Law Journal.

ST. LOUIS, MO., JANUARY 8, 1909.

CONSTITUTIONALITY OF ORDINANCES UNNECESSARILY RESTRICTING THE EXERCISE OF INDIVIDUAL LIBERTY.

Some time ago a traveler returning from a sojourn in a foreign country whose government is one of absolute despotism, complained bitterly of the attitude of the government which had refused to permit printed announcements of a religious meeting to be distributed by volunteers on the streets. And he referred to the freedom with which such printed announcements can be distributed in America as an occasion for self-congratulation.

But alas, how some of our ideals vanish when we observe how, even in this country, the severest limitations are sometimes imposed upon the most ordinary rights of the individual under and by virtue of the police power, which, undefinable as it is, offers not even an apology for such unwarranted subversion of constitutional limitations.

We have often had occasion to speak of the unlawful use of the police power in justification of unreasonable restrictions upon the liberty of the citizen and we desire here to call attention to another encroachment in this direction, serious, not so much in the hardship which it necessarily entails as in the principle which it seeks to establish. We refer to an ordinance such as that under construction in the recent case of International Text Book Co. v. City of Auburn, 163 Fed. 543, which makes it a misdemeanor "to distribute on the public streets, or from any building, hand-bills, cards, circulars or papers of any description, except newspapers."

How any self-respecting community could live under the restraint imposed by such an ordinance it is difficult to imagine. It is even more difficult to conceive how any court with any defined understanding of the limits of the police power could justify such legislation. It certainly does not tend in any material sense to promote the safety, health or morals of the general public, and, as an exercise of the power to regulate the use of the public highways, it is totally unreasonable.

We are not unmindful of the fact that many good people, enthused over the ideal of the "city beautiful," set forth by the many societies for civic improvement now organizing all over the country, are earnestly promoting such legislation. But the good intentions of enthusiasts should not lead us to throw away our liberties. If such legislation is justified, we shall soon have faddists for civic improvement proposing legislation to prohibit on the public highway the leading of a house-dog or the wearing of a "merry widow hat," or unnecessary or boisterous laughter, or conversation with a friend of more than three minutes' duration and propositions of a similar nature. All such legislation, while it may assist to materialize the dreams of those whose highest ambition is to make other people conform to their ideas of beauty and order, is clearly in derogation of common right and personal liberty.

The police power is a very salutary resource of last resort upon which to justify legislative interference with personal or property rights in order to protect the health, safety and morality of the general public under circumstances which, in the absence of conditions creating either of the three emergencies specified, would not be tolerated by usual constitutional limitations. This is our understanding of the police power, and, with this understanding, we have been able to justify such ordinances for instance, as provide for the cutting of weeds on private property (to protect public health), to prohibit the erection of signboards near public thoroughfares (to protect public safety), to prohibit the location of a saloon within a certain distance of a school (to protect public morals), and many other similar ordinances. But while we are eager to sustain any legitimate exercise of the police power whenever such exercise tends to promote the public health, morals or safety we are equally zealous in resisting unnecessary encroachments upon personal freedom under the guise of this

indefinable power, which like either arsenic or strychnine in *materia medica* is as dangerous in its misuse as it is beneficial under proper diagnosis.

The question before the federal court in the principal case was whether the ordinance already referred to interfered with interstate commerce, admitting that the business of the plaintiff, which was the maintenance of a correspondence school of instruction, was interstate commerce, about which it seems, there is some doubt and confusion among the decisions of the lower federal courts. The court unqualifiedly sustains the ordinances as within the police power of the municipality and therefore not an unlawful interference with interstate commerce. The court said: "This ordinance seeks to prevent the obstruction of the streets of a city by the solicitation of persons while traveling. It seeks to protect citizens from inconvenience and annoyance. It seeks to prevent interference with the good order of the highways and avenues of a city. It seeks to prevent them from being covered with scattered paper, and from being used as places of business, in a manner tending to interfere with the rights, comfort, and convenience of the public. It is unnecessary to cite the line of cases in which the supreme court has held that a city has, within its police powers, the right to make regulations promotive of domestic order. In my opinion, the ordinance in question belongs to this class of municipal legislation, is a regulation within the police powers of a city, and is not an interference with the reasonable conduct of the complainant's business."

With all due deference to the ability of the judge who wrote this opinion, this quotation evidences how superficially the most sacred rights of the individual are, in these latter days, bartered away for a mess of municipal pottage called "the good order of the municipality" or "the city beautiful." We cannot see where such an ordinance even remotely serves to promote the public health, morals or safety, or exists for any other purpose than to meet some supersensitive person's idea of comfort and convenience. Under this ordinance it would clearly be unlawful for churches, political committees or societies to circulate notices of their meetings, surely a matter of considerable convenience and a right in which every citizen may at some time be interested. So also it will be unlawful for self-sacrificing missionaries in our cities to circulate tracts or printed literature tending to improve the moral condition of the wayfarer into whose hands the tract is put as he rushes heedlessly by. Even under heathen and despotic governments, colporteurs of moral and religious tracts are seldom interfered with as they walk along the streets, handing a passerby the leaflet for him to read!

When will our courts assert the prerogatives given to them by the people to save our constitutional liberties from such unauthorized and ill-advised assaults. Many courts are seeing the evil of such unwarranted legislation and are sternly forbidding its operation by the fiat of their disapproval. In re France, 63 Mich. 396, 6 Am. St. Rep. 310; Barling v. West, 29 Wis. 307; Gilham v. Wells, 64 Ga. 192, and others that might be cited. If eternal vigilance is the price of liberty, we shall continue from time to time to raise our voice against such insidious encroachments upon constitutional guarantees of individual rights until either the courts or the people realize that the ultimate tendency of all such legislation which *unnecessarily* restricts personal conduct is toward a government in which the majority shall rule without any limitation upon their power,

The police power is "undefinable." True, but it is not illimitable. It may suspend constitutional guarantees to meet three public emergencies already defined. Outside of these great general limitations it cannot go. The "good order of a municipality" is not such an emergency as will justify the suspension of the constitution. The day dreams of some enthusiast are not "stuff" of sufficient importance that to materialize them, all citizens must be called upon to surrender natural rights protected by constitutional inhibitions.

NOTES OF IMPORTANT DECISIONS.

WITNESSES—LIMITATIONS UPON THE TESTIMONY OF EXPERT WITNESSES NOT THE RESULT OF OBJECTIVE EXAMINATION.—It is quite an important limitation upon the testimony of expert witnesses that such testimony shall be considered wholly inadmissible that is not the result of objective examination. Thus suppose a man to be injured on the street. There are three contingencies that would admit the expert evidence of physicians called to examine such injuries. First, as to statements made to the first emergency physician who chances to arrive. Such statements are admissible as part of the res gestae; second, as to statements made to the family physician made to secure a proper diagnosis for the treatment of his injuries and not in contemplation of future litigation. Such statements are presumed to be made under such conditions as to preclude the possibility of falsehood; third, statements and actions in the presence of a physician called in for the purpose of testifying as an expert in some future litigation. Such statements and actions are presumed to be self-serving and therefore inadmissible.

This third class of expert testimony is thoroughly discussed in the recent case of Greinke v. Chicago City Railway Co., 85 N. E. 327, where the court says: "The rule is well settled, that a physician, when called as a witness, who has not treated the injured party, but has examined him solely as a basis upon which to found an opinion to be given in a trial to recover damages for the injury sustained by the injured party cannot testify to the statements made by the injured party to him, or in his presence, during such examination, or base an opinion upon the statements of the injured party. An expert witness called under such circumstances must base his opinion upon objective, and not subjective, conditions. If, therefore, it would have been improper for Dr. Cox to have inquired of the appellee as to the relative strength of her hands, or as to whether she could use her left leg as well as her right leg, or whether she could walk without dragging her left leg, and it would have been incompetent for him to have given to the jury the result of such interrogation by detailing to them her replies to said questions (as clearly it would have been), we think it equally clear that he could not reach the same result by having her answer his questions by a nod of the head or by the pressure of her hands, or by asking her to sit upon a chair, or to walk, and then giving to the jury the results of his observations. The declarations of an injured party as to his physical condition, brought about as a result of injury, are self-serving, and, at the best, hearsay evidence. Statements, however, made by an injured party which form a part of the res gestae, or those made to his physician during treatment, constitute an exception to the general rule, and are admitted by reason of the fact that he will not be presumed to prevaricate at the very instant of his injury or while he is stating his physical condition to a physician from whom he expects and hopes to receive medical aid, nor will he be presumed to feign disease, pain, or distress under those conditions in which he is ordinarily observed by strangers or his friends and neighbors. No such safeguards, however, surround him when he is being examined by an expert whom he has employed to examine him and to give evidence in his case which is about to be tried in court. To permit the injured party, while undergoing an examination by an expert in his employ, by jerks and twitches, by a pressure of his hand, by turning his toes in or by dragging one of his legs when walking, to thus make evidence for himself, and then to permit his expert to go before the jury and bolster up and strengthen by his opinion the self-serving testimony thus manufactured by the injured party, would open up the door wide for the grossest fraud, which might work upon his adversary the most palpable injury. This character of self-serving testimony has been held incompetent by the Supreme Court of Michigan in McKormick v. City of West Bay City, 110 Mich. 265, 68 N. W. 148, and Comstock v. Georgetown Township, 137 Mich. 541, 100 N. W. 788, and the general rule announced by that court is we think, in entire harmony with the ruling of this court in the numerous cases hereinbefore cited, and is the correct rule and the one most conducive to justice. We do not intend to hold, however, that a physician may not be able, from an examination of an injured party, to form and express an opinion as to his physical condition and the probable cause which induced such condition, based upon objective testimony alone, but what we do intend to hold is that a physician who has not treated the injured party, but who has made an examination of the injured party solely with a view to testify as an expert, should not be permitted to express an expert opinion to the jury based upon subjective conditions, and then be allowed to fortify his opinion by stating to the jury acts of the injured party which could have been purely voluntary and under the control of the injured party, and which may rest upon no other basis than the truthfulness of the injured party."

DUTY AND LIABILITY OF THE PRODUCER OF AN ELECTRIC CURRENT TO THE EMPLOYEES OF OTHER PERSONS WORKING ABOUT HIS POLES AND LINES.

This question involves several subsidiary points and we shall endeavor to discuss it by considering each point separately, and shall accordingly divide the thesis along the lines mainly of the persons to whom there is an obligation, the character of the obligation and negligence thereof and the duty and negligence of the person injured.

Generally speaking, where an electric company has any reason to believe that persons may come in contact with its lines of wire, it is its duty to take such precautions to prevent injury to those persons who may come in contact with the lines from the current carried thereon. In the main it may be said that it is the duty of the electric company to cover or insulate its wires so that if in the course of their duty the employees of another are compelled to come in contact with such lines they may not receive injury. As a corollary to this rule, it is the duty of the electric company to make such inspections of the lines as will insure that the insulation which was originally sufficient continues perfect and if it finds that the elements or other causes have caused the covering to deteriorate, it becomes its duty to renew the same.

The question of liability raised under the conditions proposed by our subject depends to a certain extent also upon whether it may be said that the person injured or killed was in a place where he had a right to be at the time of the injury, or was he a trespasser, and of sufficient age and intelligence so that the rule of attractive nuisances would not be applied to him? Having answered this question in the affirmative, the next inquiry is, should the producer of the electric current have foreseen that a person rightfully where the person injured or killed was, was liable to come in contact with its wires and that if he did come in contact with them that he would be injured. If it is determined that this is the case and that the electric company should have foreseen injury from the exposure of its highly charged lines, the next question which arises is, could it have taken precautions which would have prevented injury? If it be found that such precautions, such as insulation or the use of guard wires, or the shutting down of the current, or warning that the current is to be put on, would have prevented the injury, then the inquiry changes its direction to the person killed or injured and it remains to be considered whether he neglected any precaution which a man of ordinary and reasonable prudence would have taken under those circumstances to avoid injury. In other words, should he have provided himself with non-conducting gloves, or should he have stood upon some non-conducting material, or should he have avoided contact with the lines or should he have avoided handling a conductor which was in contact with the lines which were charged?

Persons to Whom there is a Duty Owing and to Whom a Liability May be Incurred.—Of course, in the main, these questions of liability have arisen where linemen of other wire line companies have been killed or injured and the rule generally is that where such a lineman is compelled to work about the poles and wires of an electric company, that electric company is bound to take precautions for his safety. There are, however, some departures from this general rule, or perhaps it might with more propriety be said, some cases which apparently oppose it. For example, where a lineman employed by a telephone company was compelled to carry a telephone wire above and across the wires of the city fire department which wires were carried on poles in close proximity to the wires of an electric railway company, and when it became necessary for him to climb one of the fire department poles in order to get the wire across, because of which he was injured by a fall caused by a shock received from one of the fire department lines from electricity conducted thereon from contact with a railway feed wire, it was held that the railway company was not under any duty or obligation

to protect him. And in this connection the court said, in substance, that he had no permission from those operating the fire alarm system, to climb its poles. He climbed this pole without such permission and without even notice to the authorities, and consequently was a trespasser, and as he was a trespasser he took the risk incident to the trespass. The court further says that if he had had permission from the authorities in charge of the fire alarm system to use their poles, he would have been in a position somewhat analogous to that of a servant of a licensor, who while acting in pursuance of the license is injured by the negligence of the producer of the electric current and is entitled to recover; but where he leaves his proper place in the street, climbs a pole 23 feet high, without any permission from the owner of the pole, and is injured, he cannot recover unless he has given the railway company notice that he was going up the pole and unless it knew or should have known that its line was in contact with the fire department line.[1] In a somewhat similar case, a telephone company was using the poles of a street railway company upon which ran a line used by another street railway company. A trouble finder of the telephone company found that the telephone line was receiving a current of electricity from the electric line. In order to get at the difficulty it became necessary for him to release one of the span wires which supported the trolley wires. In attempting to do this he received a shock of electricity which caused his death. The current came from the contact with the feed wire of the other railway company which did not own the poles or the trolley line sagging down unto the span wire. The court held that neither company was liable, declaring that he had no business meddling with the span wire; that he was a trespasser in so doing and assumed the danger.[2]

These two cases, especially the last one, are somewhat extreme in determining who are trespassers, but it is evident from them that there is no liability to a trespasser under such circumstances. And these two cases should be carefully compared in a manner which the limits of this article does not permit, with the other cases cited subsequently hereto. It should be recalled that in the last case especially, the telephone company had a right to run its line upon the pole and it might well be considered that implied by this right with the right of maintaining the line and following from this the right to handle the other lines on the pole for the purposes of so doing. We do not, however, desire to criticise these cases, for they are absolutely unimpeachable, except upon the question as to whether or not the lineman was a trespasser.

In a comparatively recent New York case, the Brooklyn Heights Railway Company carried the wires of the police department upon the structure by which its road was elevated, the city paying to the railway company rent for this privilege. Plaintiff was a lineman in the employ of the police department, who went upon the structure of the railway company for the purpose of repairing the police department line and was injured by contact with a trolley feed wire which the Brooklyn Heights Railway Company had suffered to become uninsulated. The court held that the plaintiff was neither a trespasser nor a bare licensee. He was rightfully entitled to be where he was when injured; that the defendant owed him the duty of exercising in his behalf ordinary care, which required the exercise of such care, both in the stringing of its lines and in their maintenance, as would prevent contact with them, regardful of the inherent danger from highly charged electric wires and mindful that from time to time both its own employees and those of the city might in the course of their respective duties, come in contact with them. Further the court declares that such care properly includes reasonable inspection to preserve the insulation from decay and the action of the elements, or from rubbing against some hard substance from the action

(1) Augusta R. Co. v. Anderson, 89 Ga. 653.

(2) Sias v. Lowell, etc., St. R. Co., 179 Mass. 343, 60 N. E. Rep. 974.

of the wind or the jar of passing trains.[3] Evidently, also, where there is a contract that another company may use the same poles as those used by the electric company a similar duty is owing to the employees of the other company from the producer of the electric current. For, as has been said in a Texas case, when one company agrees that another may string its wires along its poles, it should know that the employees of the licensee company in repairing or reconstructing the plant would of necessity come in close proximity and probably in contact with the charged wires. That its duty therefore was to insulate or cover its wires and keep them properly so that the injury might not occur.[4]

It may be said to be the general rule that where several companies are using the same poles and one of such companies is a producer of a high tension electric current dangerous to human life it must cover its wire to provide against injury to employees of the other wire line companies and so as not to put in jeopardy by an unknown and invisible peril persons who may unconsciously or involuntarily in the line of their duty come in contact with the electric lines, and such persons may not be classed as mere trespassers in coming in contact with such lines, but are entitled to be there and are not trespassers in touching the wires of the other companies upon the same pole.[5]

Having considered the subject in its general aspect, we shall now discuss some of its particular phases.

Duty to Shut Off or Not to Turn on Current.—The rule is, that when the employees of others working around a line where the wires should normally be dead at that time of day, are entitled to believe them to be dead; that they are entitled to a warning before the current is turned on. Thus, where an electric company had not previously turned on its power until 5 o'clock, a day or two before the injury notified the employer that it was going to turn on the power at 4 o'clock and the employer failed to notify the employee, it was held that the electric company had performed its duty and that the employer was liable for not giving the notice.[6] Likewise, where a wire has been tested after it has broken and has been found to be dead, the electric company may be liable if afterwards one handling it is injured, where a new fuse is inserted without first determining what is wrong and without giving notice or ascertaining that it was safe to turn on the current. This liability, however, does not extend to the one who participated in the break or had caused the wire to become broken, but only applies to those who were not connected with the breaking. This is upon the theory of trespass again on the ground that the one who caused the breaking should not have meddled and that he was a trespasser, the only duty owing to him was to refrain from wantonly or wilfully injuring him.[7]

Duty to Warn That Current is to be Turned on.—The question of liability in this class of cases depends upon whether there was a duty to give a warning. If there was such a duty upon general principles of law, the electric company is liable because one is not bound to take the precautions about the wires which he has a right to suppose are dead, that he would otherwise be compelled to take. Consequently, if there is a breach of the obligation to warn then there is liability. It is to be regretted that there are no cases as yet directly in point upon this principle. The only place in which the duty to warn has arisen, is a late Illinois case, in which it was shown that it had been the custom of the electric company to blow its whistle a little while before turning on the current in its lines. Telephone linemen were wont to depend upon that whistle. It was shown, however, that the whistle was

(3) Wagner v. Brooklyn Heights R. Co., 74 N. Y. Sup. 809.

(4) Standard Light & Power Co. v. Muncey, 33 Texas Civ. App. 416, 76 S. W. Rep. 931.

(5) Newark Electric Light & Power Co. v. Garden, 78 Fed. Rep. 74.

(6) East Tennessee Telephone Co. v. Carmine, 29 Ky. 479, 93 S. W. Rep. 903.

(7) Newark Electric Light Co. v. McGilvey, 62 N. J. Law, 451, 41 Atl. Rep. 955.

blown for the benefit of the employees of the electric company and that there was no agreement or understanding that the signal should be given for the benefit of the telephone linemen, and there was no evidence of knowledge on the part of the electric company that the telephone company's employees were depending upon this whistle. It was therefore held that there was no liability where a current was turned on before the whistle was blown causing the death of the telephone company's employee.[8]

Duty to Insulate—Use of Guard Wires.—The duty to insulate has been referred to several times and it may be announced as a general rule that insulation is the chief protection required and that under the authorities the duty of an electric company is best performed by insulation. Not only is it essential that the insulation be put on originally, but it is also necessary that it be maintained both from the action of the elements, from heat and from attrition. Thus, where a wire carrying a heavy current was originally insulated, but from contact with an iron brace on a telegraph pole the insulator became worn off, the electric company is liable if one receives a shock on coming in contact with the brace, as it is the duty of the electric company to prevent this by proper inspection and care.[9]

Insulation is not necessary, however, unless it appears to be likely that someone may come in contact with the wires, so where wires pass over a building at such a height that one may not readily come in contact with them, the fact that one is upon another building adjacent and leaning over looking down upon the building upon which the wires are carried, comes in contact with the wire at a point where the insulation was defective, does not render the electric company liable.[10] It has also been considered that the fact that a wire is covered is an assumption of duty on the part of the electric company to maintain the covering to see that the wire is insulated, for the cover is calculated to induce reliance upon safety and is plainly intended to allure or induce a man who has occasion to go about the wires, to take less precaution than he would otherwise take.[11] It has been said that a company operating a lighting wire running parallel with a telephone wire and supported by the same pole is bound to know that linemen of other companies will be working about its lines and to protect the wires where it may reasonably expect persons to come in contact with them.[12]

It has also been held to be the duty of electric companies to string their wires at such a height above wires of other companies with which linemen may come in contact as to prevent crossing by the sagging of the wires and a consequent decay of insulation and danger to employees upon the other wires.[13]

Not only is it necessary that there should be insulation, but where lines cross and contact is likely to take place, guard wires should be placed so that in case of the sagging or falling of the crossing wire upon the lower wires, contact with the guard wires ill prevent contact with the charged wire.[14]

Same Subject—Ordinances.—In consonance with the general rule, failure to insulate when required by ordinance, is considered negligence. Thus, in a very late case in North Carolina, an ordinance compelled the electric company to cover its wires. A telephone wire being passed over the electric wires came in contact with them, and the person handling the telephone

(8) Rowe v. Tallorville Electric Co., 213 Ill. 318, 72 N. E. Rep. 711.

(9) Dwyer v. Buffalo General Electric Co., 46 N. Y. Sup. 374, 20 App. Div. 124.

(10) Hector v. Boston Electric Light Co., 151 Mass. 558.

(11) Newark Electric Light & Power Co. v. Garden, 78 Fed. Rep. 74.

(12) Knowlton v. Des Moines Light Co., 117 Ia. 451, 90 N. W. Rep. 818.

(13) Paine v. Electric Illuminating & Power Co., 72 N. Y. Sup. 79, 64 App. Div. 477. To the same effect is Morgan v. West Moreland Electric Co., 213 Pa. St. 151, 62 Atl. Rep. 638.

(14) Commonwealth Electric Co. v. Rose, 114 Ill. App. 191.

wire was killed. The court held that the failure to comply with the ordinance was negligence; that the deceased was entitled to rely upon the fact that the wires were insulated as making him safe even though the wire which he was handling should come in contact with the electric wire. In other words, he was entitled to presume that the ordinance had been complied with.[15] The fact that the ordinance requires certain things to be done and does not require other things to be done, does not prevent the failure to do such other things from being negligence. For example, the fact that the ordinance does not require guard wires when it requires insulation, does not prevent it being held negligence not to put up the guard wires, if in the exercise of the prudence of an ordinarily prudent man they should have been placed.[16]

Contributory Negligence—Care in General.—Of course, it goes without saying, almost, that if one employed about electric lines might in the exercise of reasonable prudence have seen and avoided the danger, he cannot recover if injured, since his own negligence contributed to his injury. In harmony with this rule it has been held that one who deliberately comes in contact with a wire carrying a deadly current of electricity, knowing that nothing stands between himself and the power save a thin and flexible layer of insulating material liable to become impaired by exposure, erosion or abrasion without inspecting the point of contact, is guilty of such contributory negligence as will prevent his recovery if injured, or will prevent a recovery by his relatives if he is killed. He has no right to speculate as to whether or not the covering is defective.[17] In the case just cited the court seems to lay especial stress upon the fact that the contact was intentional and says that deceased came in touch with it not inadvertently or from necessity, but deliberately and intentionally. By inference from this it may be concluded that had he come in contact with it inadvertently or from necessity, he would not have been held guilty of contributory negligence. Likewise, if one stands upon a highly charged wire and throws his hands about among other wires he is guilty of contributory negligence.[18]

Whether or not one is guilty of contributory negligence in going so near to a highly charged wire while descending a pole where the insulation is defective, as to have the wire come in contact with him by the action of the wind or the passage of a car, is for the jury to determine, and it may not be said that he is guilty of contributory negligence as a matter of law.[19] But the Georgia court held that where one came to his death in attempting to pass a highly charged railway wire where the insulation was defective, while undertaking to ascend one of his employer's poles, was guilty of contributory negligence if he knew it to be unsafe to attempt to pass the wire or if there was a safer way in which to reach the object of his employment. The court, however, does not point out what the safer way would have been in this case and that there was a safer way does not appear from the evidence.[20]

Same Subject—Duty to Wear Gloves.—It has been insisted in some cases that one employed about wires must wear insulating or non-conducting gloves. It has not yet been held to be the law, however, that gloves must be worn, in any of the cases in which the question has been raised, even though it was the rule of the plaintiff's employer, but not of the company on whose lines he was injured by coming in contact with, that all wires must be treated as live wires and that gloves must be worn. Con-

(15) Mitchell v. Electric Co., 133 N. C. 166.

(16) Commonwealth Electric Co. v. Rose, 114 Ill. App. 181.

(17) Mangan v. Hudson River Telep. Co., 100 N. Y. Sup. 539.

(18) Martin v. Citizens' General Electric Co., 29 Ky. 103, 92 S. W. Rep. 547.

(19) Ziehn v. United Electric Co., 104 Md. 48, 64 Atl. Rep. 61.

(20) Columbus, etc., R. Co. v. Dorsey, 119 Ga. 363, 46 S. E. Rep. 635.

sequently, the court did not consider in an Illinois case that the failure to wear gloves, to use a safety belt while on a pole, or the standing upon a steel cable connected with the ground instead of upon a wooden cross-arm, while handling wire lines was evidence of contributory negligence.[21] And where it was the rule of the employer of plaintiff's intestate that all employees should treat every wire as a live wire and where that employer furnished rubber gloves, it was held that the failure to wear those gloves where a street car coming along lifted the trolley wire so that the current was sent through the wires on which plaintiff's intestate was working, inasmuch as deceased had no reason to believe when he mounted the pole that there was any occasion for him to wear gloves, was not contributory negligence.[22]

If one killed by an electric current while endeavoring to cross an electric line with a telephone wire is justified as a reasonably prudent man in believing that such insulation as was required by the ordinance of the city, would make a contact between the two wires free from danger and had reasonable ground to believe that the electric wire was thus insulated, it would not be contributory negligence for him not to wear rubber gloves or to stand on the damp ground, instead of on a dry board or on the linemen's wagon.[23] Obviously, the converse of this proposition is the law, for if the deceased had reasonable grounds for anticipating the injury then he should have taken such precautions as a reasonably prudent man should have taken under those circumstances, such as avoiding contact between the wires, wearing gloves, or otherwise insulating himself. Again, it has been held that when one killed by handling wires was entitled to assume that he was simply to handle wires carrying a low voltage and that he would not be required to wear gloves and where it is not shown to have been customary to wear gloves although the deceased was an experienced lineman, it may not be said that he was guilty of contributory negligence in not providing himself with gloves.[24]

Upon the whole subject, therefore, it may be concluded that it is in the main the duty of electric companies to protect their wires and that it is not the duty of linemen working among them to protect themselves unless they intentionally take hold of a wire which they know to be heavily charged, or unless they have reasonable grounds for anticipating that precautions are necessary. In other words, there is very little of novelty except in the particular facts in these cases to which old rules of negligence and contributory negligence applicable to all cases of this general nature have been applied.

COLIN P. CAMPBELL, L.L. M.

Grand Rapids, Mich.

(21) Commonwealth Electric Co. v. Rose, 114 Ill. App. 181.

(22) Mahan v. Newton, etc., St. Ry. Co., 189 Mass. 1, 79 N. E. Rep. 59.

(23) Knowlton v. Des Moines Light Co., 117 Ia., 451, 90 N. W. Rep. 818.

(24) Paine v. Electric Illuminating & Power Co., 72 N. Y. Sup. 279, 64 App. Div. 477.

INHERENT POWER OF COURTS AS TO DISBARMENT, AND STATUTORY ENUMERATION OF GROUNDS THEREFOR.

In re EGAN.

Supreme Court of South Dakota, Oct. 10, 1908.

The court's control over an attorney as an officer of the court is inherent, and does not depend upon statutory authority, and the specification of certain grounds of disbarment by the statute does not prevent disbarment for other grounds.

CORSON, J.: This is an original proceeding instituted in this court by a committee of the bar of Minnehaha county to disbar George W. Egan, an attorney of this court.

On the 15th day of November, 1907, the accused was admitted to practice as an attorney of this court, and the usual license issued to him. At the time the application was made for his admission,, objections were filed thereto on the part of the bar of Minnehaha county; but, in view of the fact that proceedings were pending in the county court of that county for the appointment of a guardian for the person and estate of Julia Ann O'Grady, and also an action was about to be commenced by the guardian of Julia Ann O'Grady in the cir-

cuit court of that county to cancel and annul certain conveyances alleged to have been made by her to the accused, and in order not to embarrass the courts before named in their decisions, this court declined at that time to enter upon a full examination of the objections filed on the part of the members of the bar, and therefore granted a license conditional, which is as follows: "It is ordered that George W. Egan, upon taking and filing the required oath, be admitted and licensed to practice as an attorney and counselor at law in all the courts of this state, provided, however, that this order shall not preclude disbarment proceedings, based upon the conduct of said George W. Egan concerning the transfers of certain property to him by one Julia Ann O'Grady mentioned in the objections to his admission, if it shall hereafter be finally determined by a court of competent jurisdiction that such transfers should be canceled on the ground of fraudulent procurement." Subsequently to the making of said order the circuit court of Minnehaha county, Judge Frank B. Smith presiding in place of and at the request of the Honorable Joseph W. Jones, circuit judge of that circuit, has made and filed its decision in which it finds in effect that said transfers were fraudulently obtained, and entered a judgment directing the cancellation of the same, and the recovery by the guardian of the said Julia Ann O'Grady of $1,050 received on account of a United States bond held by the said Julia Ann O'Grady and transferred to the said accused by her as a part of the fraudulent transaction so found by the court. Although the time for appealing from this judgment has not expired, and such judgment cannot be regarded as res adjudicata by this court, it was entered by a court of competent jurisdiction, and will be regarded as fulfilling the conditions prescribed by the order admitting the accused to practice as an attorney of this court. The objection therefore made by counsel for the accused to this proceeding on the ground that this court has duly adjudicated the questions involved herein are not tenable, and are therefore overruled.

Upon this application to this court in this original proceeding, this court appointed a commissioner to take the testimony in the case, and report the same to this court on the first day of the present month. That duty has been performed by the commissioner, and the case is now before us for final determination. The prosecutors, after setting out the findings and the judgment of the court in the action before referred to, tried before the Honorable Frank B. Smith, as judge sitting for, and at the request of the Honorable Joseph W. Jones, judge of the circuit court of Minnehaha county, proceed to allege: "The said accusers, irrespective of the findings, conclusions, and judgment hereinbefore referred to, and in addition thereto, charge the said George W. Egan, with misconduct unbecoming an attorney and counselor of this court concerning the transfer of the property specifically mentioned and described in the complaint and in the findings, conclusions, and judgment in said action, as well as in the order admitting said George W. Egan to practice in all the courts of this state, and specifically that on the 9th day of October, 1907, and for some time prior thereto, the said Julia Ann O'Grady was mentally incompetent to manage, control, or dispose of her property or to transact any business in relation thereto, and that on said date, while so mentally incompetent, the said George W. Egan, well knowing her mental condition as aforesaid, and taking advantage of the same for his own purposes and benefit, did wrongfully and fraudulently influence and procure her to, and she did, without any consideration therefor, transfer to said George W. Egan all of her property hereinbefore referred to. Said accusers further charge distinct and separate from the charges hereinbefore made against said George W. Egan that, in violation of his duty as an attorney and counselor at law both to the courts and to the said Julia Ann O'Grady, said George W. Egan did, after the said Julia Ann O'Grady had been judicially declared to be incompetent to manage her own affairs as hereinbefore stated, and after his admission to practice by this court, keep and retain and refuse to deliver the property belonging to the said Julia Ann O'Grady procured by him as hereinbefore stated to W. L. Baker, her guardian, upon demand duly made by him of said George W. Egan for said property. Wherefore, said accusers ask this court to issue proper process, for the said George W. Egan to show cause why his license to practice as an attorney and counselor in all the courts of this state should not be revoked and his name stricken from the roll, or for such other order as to the court may seem just in the premises," which complaint is duly verified. The evidence is very voluminous, covering several hundred typewritten pages, and we shall not attempt in this opinion to do more than give a synopsis of the same.

It is disclosed by the undisputed evidence that on and for a long time prior to the 29th day of September, 1907, John O'Grady and his wife, Julia, resided on a farm which was their homestead, in Mapleton township, between six and seven miles north of the city of Sioux Falls, in Minnehaha county; that they had no children; that on the evening of September 29, 1907, said John O'Grady was killed by a shot

fired from a shotgun; that the coroner and sheriff of said county, being notified of the tragedy, immediately went to the O'Grady home, where they made a hasty examination of the body of John O'Grady and the surroundings; that the coroner took the body to his undertaking rooms in the city of Sioux Falls; that, suspicions resting upon Mrs. O'Grady, the sheriff took her to Sioux Falls, and held her in custody in jail; that a coroner's inquest was held on Tuesday or Wednesday; that the state's attorney filed an information charging Mrs. O'Grady with the murder of her husband; that a preliminary hearing was held before a justice of the peace on Wednesday or Thursday of that week, and that the justice upon the hearing, ordered her committed to jail without bail; that on Monday, September 30th, Mrs. O'Grady sent for Mr. Winsor, an attorney of Sioux Falls, who was retained by her; that Mr. Winsor appeared for her at the coroner's inquest, and also at the preliminary examination; that afterwards he made a motion before the Honorable Joseph W. Jones, circuit judge, to have her admitted to bail, which motion was heard on Monday, October 7th, and the motion was granted and the bail fixed at $7,500; that Mr. Winsor procured bondsmen for her, and she was released from custody on the evening of that day; that, as she left the jail, about one block from the court house, she was met by one Nick Roster and one Mumby. that a talk was there had about employing Mr. Egan, the accused, as her attorney; that it was then arranged with Mr. Mumby that he should see her after supper at the house of one Minzlaff; that after supper Mumby went to Minzlaff's house, but failed to find her, and continued his search for her without success; that the next morning he pursued his search for her, and in the evening found her near the town of Egan; that she did not return with him, but promised to return on the following morning train, which she did, arriving at Sioux Falls about 7 o'clock on October 9th; that Mumby and Roster met her at the train, and she was taken to the office of Dr. Egan, where she met the accused; that during the morning, while she was in the office of Dr. Egan, a deed of the farm formerly occupied by herself and husband, and a bill of sale of her personal property, was signed by Mrs. O'Grady, and immediately placed on file in the office of the register of deeds; also, a contract was signed by Mrs. O'Grady agreeing to pay Mr. Egan $10,000 for his services; that, in addition to the conveyances of her real and personal property, the accused procured an order from her for a tin box in the charge of the sheriff, in which was a government bond for $1,000, which bond was subsequently sold by the accused and the money received by him therefor; that the bondsmen procured by Mr. Winsor, learning of the transfer by Mrs. O'Grady of all her property to the accused, surrendered her up to the sheriff; that subsequently other bondsmen were procured, and she was again released; that a short time subsequently proceedings were instituted before the county court of Minnehaha county for the appointment of a guardian for Mrs. O'Grady upon the petition of a committee appointed by the Minnehaha county bar association; that on the 7th of November, 1907, the county court adjudged her mentally incompetent to manage her property, and appointed one W. L. Baker as her guardian, who thereupon immediately qualified as such guardian; that an appeal was taken from this appointment and judgment to the circuit court of Minnehaha county, where a trial was had, and the judgment of the county court was affirmed, and the case remanded to the latter court for further proceedings; that soon after the decision of the circuit court affirming he decision of the county court appointing a guardian for Mrs. O'Grady the state's attorney of Minnehaha county entered a nolle prosequi in the case of the state against Mrs. O'Grady, and her bondsmen were exonerated; that in the early part of March, 1908, Mrs. O'Grady went to Oklahoma, where her parents and brothers and sisters reside. that, arriving there, she at once manifested symptoms of insanity, and on the 11th day of April, after an examination before the commissioners of insanity, she was adjudged insane, and committed to the State Hospital of Oklahoma, where she still remains; that in both of the above hearings before the county court and the circuit court the accused appeared for Mrs. O'Grady in resisting the charge of insanity; that, soon after his qualification as guardian on November 18th, the said Baker demanded in writing of the accused all property and money that had been conveyed and delivered to him by Mrs. O'Grady, which demand he refused. that thereupon, about November 19th, an action was commenced by the said guardian against the accused for the cancellation of the said deed and bill of sale, and the recovery of all said property, resulting in a judgment in favor of the said guardian, canceling and setting aside the said conveyances, and that he recover judgment against the accused for the sum of $1,050.

It further appears from the evidence that Mrs. O'Grady had the sum of about $50 which she turned over to the accused in connection with her other property on the forenoon of October 9th, and that she was left with a small sum in change, and, with that exception, she had transferred to the accused all of her property, real and personal, including the bond

above mentioned and a $2,400 note and mortgage and the $50 in money, and that she left the office of Dr. Egan after making those transfers without any means for her support or maintenance. It further appears from the evidence that during the time she was in the office of Dr. Egan, and was making these transfers of her property to the accused, Dr. Egan, Mr. Mumby, and Roster were present, but she had no friends or acquaintances with her, and there alone with the accused and the three parties before named she apparently signed any paper that was presented to her by the accused for her signature. It is further disclosed by the evidence that for some time prior to the death of her husband she had shown evident signs of insanity; that, after she was taken to the jail, she seemed possessed with the delusion that she was to be hanged immediately in the presence of the people, and that she said to Mr. Winsor, Mrs. Winsor, Mr. O'Reiley, the deputy jailor and the sheriff, repeatedly that she knew she was to be hung on the same gallows that had been used some years previously for hanging a person that she named, and that she had seen the workmen preparing the scaffold for her execution. While in jail she complained of being ill, and, the county physician being called to attend to her, she refused to take his medicine, stating that she knew that it was poison; that she refused to eat anything prepared at the jail for the reason that they were intending to poison her. It further appears that, when she was released from the jail and taken to the home of Mrs. Horton, her conduct was such that the Horton family were fearful of their own lives and those of their children, and that they requested the sheriff to remove her to some other place. While there was some evidence on the part of accused tending to prove that she was mentally competent to transact business, we are clearly of the opinion that she was of unsound mind and mentally incapable of understanding what she was doing at the time she transferred her property to the accused.

It is claimed by the accused that at the time she transferred all of her property to him, that he made out a written memorandum agreeing to account to her for the property received, but, in view of the fact that he had her contract agreeing to pay him a fee of $10,000, the accounting would have been of but little benefit to her, as the property transferred by Mrs. O'Grady did not exceed in value $6,000, and she would have therefore been left indebted to him in the sum of $4,000 on account of his fee, less some deductions he claims he agreed to make in case the criminal proceedings against her should be terminated in the circuit court. It will be noticed that the conduct of the accused after being retained by Mrs. O'Grady to defend her on the charge of the murder of her husband, in advising her to resist the application for the appointment of a guardian for her and acting as her counsel in the probate court in resisting the application on the ground that she was mentally incompetent to attend to her business, and again appearing in the circuit court in further resistance of the application for the appointment of a guardian for her, was an extraordinary proceeding, as the establishment of her mental incapacity would have aided him very greatly in her defense upon the grave charge against her. In thus defending her and in appearing for her in opposing these proceedings, he was acting directly against the interest of his client, and could have had no other object in view than that of maintaining the legality of the transfers of her property to him made by her.

It is claimed by the accused that the conveyances of the property were taken in the nature of security to her bondsmen, but this claim cannot be considered a valid one, as, if that was the object of the conveyances, they should have been in the form of a mortgage to the bondsmen or in the form of a trust deed. His subsequent conduct, therefore, in refusing to turn over the property, quite clearly shows that he took the property from her for his own benefit, notwithstanding the memorandum in pencil which he claims to have executed agreeing to indemnify the bondsmen and the memorandum in pencil agreeing to account to Mrs. O'Grady for the proceeds of the property. The conduct of the accused in securing from Mrs. O'Grady her entire property, and leaving her comparatively penniless, was such misconduct on his part as to render him an unsuitable person to remain as an officer of this court, and to be further permitted to perform the duties of an attorney.

The relation existing between an attorney and his client is one of great confidence, and gives the attorney great influence over his client. The relation he bears to his client implies the highest trust and confidence. He is an officer of this court, and in the performance of his duties as such an attorney he is required to observe towards his client the utmost good faith, and to allow no private interests of his own to conflict with the interests of his client. An attorney also owes a duty to his profession and to the court from which he has received his license, as well as to his client. As an officer of the court, the latter may exercise its jurisdiction over him to the extent of depriving him of his office, and striking his name from the roll. Such a power is indispensable to protect the courts, the dignity

and purity of the profession, and for the public good and the protection of clients. While our Code has provided certain causes for the revocation or suspension of an attorney, the power to cancel a license issued is an inherent power in the court, and, as stated by Mr. Weeks in his work on Attorneys: "No statute or rule is necessary to authorize the punishment in proper cases. Statutes and rules may regulate the power, but they do not create it. * * * And, where certain grounds are specified by the statute, this does not necessarily exclude striking from the rolls for causes not specified. A statute is not to be construed as restrictive of the general powers of the court over its officers." Weeks on Attorneys at Law, sec. 80; 4 Cyc. 905, 906; In re Smith, 73 Kan. 743, 85 Pac. 584; State v. Mosher, 128 Iowa, 82, 103 N. W. 105; Boston Bar Ass'n v. Greenhood, 168 Mass. 169, 46 N. E. 568; State v. Harber, 129 Mo. 271, 31 S. W. 889; In re Simpson, 9 N. D. 379, 83 N. W. 541-553.

The conduct of the accused in this case, not only shows his unfitness to be a member of this court, but shows that his perceptions of the duties and responsibilities of an attorney are such as to render him an undesirable associate of the members of a highly honorable profession, and dangerous for clients who may seek his assistance as an attorney. While we cannot overlook the fact that striking the name of the accused from the roll and revoking his license may result in serious consequences to himself and family, we cannot be unmindful of the duty we owe to ourselves, the courts of the state, the members of the bar, and the community in general. Such conduct as has been shown in this case reflects, not only upon the attorney himself, but seriously reflects upon the court and the members of the bar. All of the considerations that could be advanced in favor of the accused were ably presented by eminent counsel, but we have failed to discover any extenuating circumstances attending this remarkable transaction. To permit the accused to longer remain an officer of the court and entitled to the privileges accorded to an injustice to ourselves, to the profession, and professional conduct, and encourage the younger members of the bar to pursue a course that cannot be recognized by this court. It has been the aim of this court to elevate the character both morally and intellectually of the members of the bar and to retain the accused longer as a member of the bar would be doing an injustice to ourselves, to the profession, and to the community. Unpleasant, therefore, as is the duty, we must perform it, and strike from the roll of this court the name of the accused, and cancel the license heretofore issued to him.

NOTE—*Inherent Power of Court to Disbar.*—I do not believe, that any case may be found which goes further in the maintenance of the principle that courts have an inherent power in disbarment of attorneys who are members thereof, than does the case of Ex parte Wall, 107 U. S. 265, which upheld a judgment of disbarment by a federal circuit court because of the alleged commission of an indictable offense against the laws of a state, which offense though heinous pertained in no special or exclusive way to the office of the attorney proceeded against. The attorney participated in a lynching and a federal court of whose bar the attorney happened to be a member disbars him for it. Justice Field filed a vigorous dissent. The oratory (if impassioned language in a judicial utterance may be so classed) of the court's opinion in its denunciation of mob law, its reference to lawyers being most "sacredly bound to uphold the laws" and the inference of "recreancy to his position and office" all seem, though from the pen of so analytical and profound a jurist as was Justice Bradley, not to have been necessary. It carries the idea that one's right to earn a living in a chosen profession too much depends on an attorney in a court presided over by a particular judge squaring his conduct in life, in other than professional affairs, according to the rule of uprightness or disobedience to law, which such judge may adopt or hold to.

There is a statement of the rule as I have found it in a recent case decided by the Supreme Court of Errors of Connecticut. In re Durant 80 Conn. 140, 67 Atl. 497. There it is said that "an attorney at law is an officer of court exercising a privilege or franchise to the enjoyment of which he has been admitted, not as a matter of right, but upon proof of fitness through evidence of his possession of satisfactory legal attainments and fair private character." To this there is cited considerable authority. This position being taken the Connecticut court then deduces the conclusion that "he is continually accountable to the court, and it (the franchise or privilege) may at any time be declared forfeited for such misconduct, whether professional or non-professional as shows him to be an unfit or unsafe person to enjoy the privilege conferred upon him and to manage the business of others in the capacity of an attorney." There also is some citation as to this being an inherent power in the courts. All of which seems to place attorneys in a class by themselves, with their right to practice a profession or exercise a franchise or privilege different from others. It must be undoubted that a statute may prescribe, what steps may entitle one to obtain such a franchise or privilege, and that a court refusing to pass a formal order for admission to the bar might be proceeded against by mandamus, just as a board might be proceeded against where wrongful refusal to grant a license to physician or dentist is alleged. And again the matter of the right of an attorney to exercise the franchise or privilege, which is larger than the right to conduct litigation in a particular court or a number of courts and includes the right to advise as to legal rights and remedies outside of court, and collect by suit reasonable compensation therefor, would seem to demand that there ought to be statutory definition as to the effect of disbarment. The right to practice law is a property right,

and it ought to be taken away from one only by due process of law. Therefore it would seem that, if a compliance with certain requirements may secure one's admission to the exercise of the privilege or franchise of practicing law, statutory enumeration of grounds for disbarment ought like other enumeration to have, in construction, the principle of the inclusion of one thing being exclusion of another. Here is what the California Supreme Court says on the question of statutory enumeration, in answer to the contention that the power being inherent enumeration by statute is not exclusive: "We are not inclined to indorse the contention of relators in this respect, Whatever the rule may be, in the absence of statutory regulations as to the power of the courts to deprive attorneys of their licenses for causes, which, in the judgment of the court, may warrant that action, we are satisfied that when the legislature has specified the acts for which an attorney may be disbarred, or suspended, the court is not authorized to act for other causes, or warranted in invoking an asserted implied power to remove for causes not specified in the statute." This case also quotes from an early California case about "the manner, terms and conditions of admission to practice and continuance in practice and the powers, duties and privileges of attorneys being proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is regulated by statute." See In re Collins, 147 Cal. 8, 81 Pac. 220. In the case of In re Eaton, 4 N. D. 514. 62 N. W. 597, there were several specifications in the petition in proceedings for disbarment, some of which were disposed of by ruling that they did not come within the statute for disbarment and the judgment for disbarment was reversed because there was not sufficient evidence to sustain those that did. In North Carolina the distinction is drawn between proceedings for contempt and those for disbarment and it was upon this distinction that a statute forbidding disbarment except for specified statutory reasons was held constitutional, notwithstanding the inherent powers of a constitutional court. Kane v. Haywood, 66 N. C. 1, 31; Ex parte Schenck, 65 N. C. 253. In re Boone, 83 Fed. 944, 948, says that "in the United States courts the power to disbar is to be distinguished from the power to punish for contempt." Therefore it may be fairly said, that when courts speak of the "inherent" power of courts in disbarment proceedings, there ought, if the matter is analyzed strictly, to be a different sense taken of the word. It is not inherently necessary for a court to be a general inquisitor into the private life and morals of one who exercises his privilege or franchise in the earning of a livelihood before it as a department of government. Because there is a higher responsibility on an attorney than on another, he yet ought to be compelled to behave himself like another, and only like another. There are many cases—the greater number—that rule statutory enumeration of causes for disbarment is not exclusive, but I have found nowhere the subject clearly discussed, but some precedent or dictum has merely been followed.

When we get into the domain of making an attorney answerable for matters not pertaining to his profession, and solely because of his integrity or moral character being impeached, it may be that he might be punished for a thing as to which no other person could be held responsible. This is well illustrated in the case of Becker v. Com., 31 Ky. Law Rep. 708, 103 S. W. 378, where disbarment proceedings were begun against an attorney who voluntarily made a false affidavit to be used in a judicial proceeding in which he was not acting as an attorney. The court of appeals set aside the judgment of disbarment, saying that if the judgment was valid "then it must be conceded that an attorney summoned as a witness stands in a different attitude with reference to responsibility for his testimony than any other witness." And: "It seems to us that the public policy which shields a layman who is a witness from all punishment except criminal prosecution for perjury if he bears false witness protects an attorney at law, who is a witness to the same extent." In Colorado, however, and this I think is in accordance with the weight of authority, an acquittal on a criminal charge is no obstacle to disbarment therefor. People ex rel. v. Thomas, 36 Colo. 126, 91 Pac. 36.

The writer believes in the promptest of punishment for offenses of a professional nature and those of non-professional character affecting the moral standing of attorneys, but he also believes in statutory designation of those things, which may work a forfeiture of the right to pursue a calling, for which one has trained himself by a long career, and which to an extent may have unfitted him in the earning of a livelihood in a different vocation. Furthermore it is a professional duty of a lawyer to try to secure certainty as far as possible in the definition of every legal status, and the example should not remain of what pertains to himself peculiarly being more uncertain than is the status of any individual in any other profession, avocation or pursuit.

N. C. COLLIER.

St. Louis, Mo.

HUMOR OF THE LAW.

A dapper young negro walked into the County Clerk's office not long ago and asked for a marriage license. After filling in a few preliminaries, the Clerk asked:

"Name of the lady."

Rastus scratched his head.

"Now, theah yeh got me, boss," he said. "I ain't 'zackly made up my min' yet whethah I'm gwine take Marthy or Lucindy. Yeh couldn't leave that out foh awhile could yeh, cun'l?"

"Certainly not—you must decide now on the name of the bride, or your license is no good," said the official, whereupon Rastus pondered deeply and finally announced that he would take Marthy to be his wedded wife. The form being duly filled in with the name of Miss Marthy Johnsing, Rastus paid the fee and departed to celebrate the nuptials. In about half an hour he returned.

"Cun'l" he said. "I done got to thinkin' 'bout dat Lucindy gal—she's a mighty likely yaller gal—seems like I'm 'bleeged to marry Lucindy. Couldn't yeh jes' change the name in that one place?"

"I'd have to make out a new form for you," said the Clerk. "Cost you two dollars for a new license."

"Lawdy!" said Rastus. "Two dollars! Um-um! I'll marry Marthy. They ain't no two dollahs diff'ence in them gals!"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Amicus Curiae**—Appointment.—It was error for the orphans' court, in the absence of any exception taken to the account of executors, to appoint an amicus curiae to file exceptions and then sustain them, and surcharge the executor's accounts with alleged excessive counsel fees paid.—In re Stitzel's Estate, Pa., 70 Atl. Rep. 749.

2. **Appeal and Error**—Damages.—A party cannot complain that the jury found less damages against him than they should have found.—Johnson v. Perkins, Ga., 62 S. E. Rep. 152.

3.——Reversal and Effect.—A judgment in petitioner's favor against plaintiff and defendant, where plaintiff did not appeal, was final as to it, so that a reversal of the judgment against defendant did not affect plaintiff.—Exposition Amusement Co. v. Empire State Surety Co., Wash., 97 Pac. Rep. 464.

4.——Time to Appeal.—That an order cannot be reviewed on appeal, because the notice of appeal was not given in time, does not operate to dismiss the appeal as to other orders which are reviewable.—Loveday v. Parker, Wash., 97 Pac. Rep. 62.

5.——Transcript of Evidence.—The stenographer's certificate to a transcript of the evidence is sufficient to authenticate the transcript in the first instance. If it is subsequently settled by the judge on objections thereto, his certificate is sufficient to authenticate it as a full, true, and complete transcript.—Bliss v. Brown, Kan., 96 Pac. Rep. 945.

6. **Attorney and Client**—Suit to Set Aside Mortgage.—In a suit by a client to set aside a mortgage given to his attorney, the attorney held required to establish by preponderance of the evidence that he acted in good faith and that the mortgage was given for a valuable consideration.—Phipps v. Willis, Ore., 96 Pac. Rep. 866.

7. **Bail**—Forfeiture.—That one under bail was prevented from attending court because of being accidentally shot, though while out of the state, held ground for relief from forfeiture.—Hargis v. Begley, Ky., 112 S. W. Rep. 602.

8. **Bailment**—Injury to Property.—An unreasonable or impossible explanation of an injury to property while in the hands of bailee may be equivalent to an admission of liability.—Johnson v. Perkins, Ga., 62 S. E. Rep. 152.

9. **Bankruptcy**—Actions Against Bankrupt.—Under Bankr. Act, c. 541, sec. 17a (2), which excepts liabilities for obtaining property by false pretenses from debts released by a discharge, a bankrupt is not entitled to the stay of an action against him in a state court where it appears that it is based upon such a liability asserted in good faith.—In re Lawrence, U. S. D. C., N. D. Ala., 163 Fed. Rep. 131.

10.——Creditors.—A creditor of a bankrupt may not split his claim and assign parts to others to qualify them as joint petitioners in an involuntary bankruptcy proceeding.—In re Halsey Electric Generator Co., U. S. D. C., D. N. J., 163 Fed. Rep. 118.

11.——Debt Entitled to Priority.—Commissions paid a traveling salesman for his services are "wages" within the meaning of Bankr. Act, c. 541, sec. 64b (4), and a claim for such commissions earned within three months prior to the bankruptcy of the employer is entitled to priority thereunder.—In re Fink, U. S. D. C., E. D. Pa., 163 Fed. Rep. 135.

12.——Discharge.—An objection to the discharge of a bankrupt, which charges in the language of the statute the failure to keep books of account from which his financial condition might be ascertained with intent to conceal such condition, is subject to objection as being indefinite, but may be accepted as sufficient where the bankrupt has testified that he kept no books of account.—In re Lewis, U. S. D. C., E. D. N. Y., 163 Fed. Rep. 137.

13.—Exemptions.—While a bankruptcy court has no jurisdiction over property claimed by the bankrupt as exempt once the right to it has been established, it may as preliminary to that, determine whether for any reason the right cannot be asserted.—In re Highfield, U. S. D. C., M. D. Pa., 163 Fed. Rep. 924.

14.——Lien of Bank on Deposits.—A bank holding notes of a depositor which are due has the right to charge the same to the depositor's account. Such right is not strictly a lien, within the meaning of the bankruptcy law, but a right of set-off, which can be exercised only as to notes which are due.—Irish v. Citizens' Trust Co. of Utica, U. S. D. C., N. D. N. Y., 163 Fed. Rep. 880.

15.——Refusal to Surrender Property.—The mere denial by a bankrupt under oath of the possession of assets belonging to his estate is not conclusive, and does not preclude the court from enforcing its order requiring him to surrender such property to his trustee by imprisonment for contempt, where it has found on sufficient evidence that it is in his possession or under his control.—In re Lasky, U. S. D. C., N. D. Ala., 163 Fed. Rep. 99.

16.——Voidable Preferences.—A bank which received payment of notes from an insolvent corporation within four months prior to its bankruptcy held not to have known at the time, or had reasonable cause to believe, that the debtor was insolvent, or intended a preference, which would render the payment recover-

able as a preference by the trustee in bankruptcy.—Irish v. Citizens' Trust Co. of Utica, U. S. D. C., N. D. N. Y., 163 Fed. Rep. 880.

17.——Voidable Preference.—A payment of a note to a bank by an insolvent corporation within four months prior to its bankruptcy, through the medium of another corporation which held property of the bankrupt against which it charged the amount, held to constitute a voidable preference of the bank.—Mason v. National Herkimer County Bank of Little Falls, U. S. D. C., N. D. N. Y., 163 Fed. Rep. 920.

18. **Banks and Banking**—Appointment of Receivers.—In proceedings by the attorney general to enjoin further business by a bank, the appointment of a receiver by the court in such suit after finding of insolvency was not an appointment without notice, the act itself constituting notice.—People v. Bank of San Luis Obispo, Cal., 97 Pac. Rep. 306.

19.——Certificates of Deposits.—A bank held estopped from interposing any defense against the amount due on a certificate of deposit issued by it.—Old Nat. Bank v. Exchange Nat. Bank of Coeur d'Alene, Idaho, Wash., 97 Pac. Rep. 462.

20. **Bills and Notes**—Burden of Showing Consideration.—In an action by a transferee of a note, the burden of showing that he obtained the note before maturity for a valuable consideration and without notice held shifted to plaintiff.—Penfield Inv. Co. v. Bruce, Mo., 111 S. W. Rep. 888.

21.——Extension of Time for Payment.—A promise to pay the interest specified in a past-due note until such indefinite time as the maker can pay the note out of his business is not a legal consideration for a promise to extend the time of payment.—First State bank v. Schatz, Minn., 116 N. W. Rep. 917.

22. **Boundaries**—Descriptions.—Where a city, owning the fee of a street, conveys land abutting thereon, the presumption that the grantee takes to the center of the strip does not hold; but the presumption applies to the case of an old city street in New York City in which the fee is not in the city.—Webber v. Gillies, 112 N. Y. Supp. 397.

23. **Cancellation of Instruments**—Deeds.—A court of equity will not interfere to cancel a deed by a debtor for the purpose of defrauding his creditors in an action against the grantee in the deed, but where the conveyance has not in fact been made the general rule does not apply.—Bowers v. Cottrell, Idaho, 96 Pac. Rep. 936.

24. **Carriers**—Freight Shipment.—Statement of station agent, to one about to deliver goods for shipment, that the goods should arrive at destination at a certain time, is not a contract to carry them within such time.—Sauter v. Atchison, T. & S. F. Ry. Co., Kan., 97 Pac. Rep. 434.

25.——Place of Transportation.—A passenger injured by derailment must show, not only that he was a passenger, but that at the time of the accident he was in a place where he had a right to be, or, if he was not in a proper place, that it did not affect the result.—Winters v. Baltimore & O. R. Co., U. S. C. C., S. D. Ohio, 163 Fed. Rep. 106.

26.——Restraining Enforcement of Rates.—A preliminary injunction granted to restrain the enforcement of rates established by the state of Arkansas on intrastate railroad traffic on a showing that such rates have in practice proven nonremunerative and confiscatory.—In re Arkansas R. Rates, U. S. C. C., E. D. Ark., 163 Fed. Rep. 141.

27. **Charities**—Beneficiaries.—A charitable trust may be sustained, though the individual beneficiary is uncertain, where the beneficiary is definite as to the class.—In re Nilson's Estate. Neb., 116 N. W. Rep. 971.

28. **Chattel Mortgages**—Rights of Co-Tenant.—Where the owner of mortgaged cattle kept them in a pasture held by him as tenant in common with others, any rights of either of the co-tenants among themselves to compensation for pasturage could not affect the lien of the mortgage.—Cable v. Duke, Mo., 111 S. W. Rep. 909.

29. **Commerce**—Act of Congress.—The act of Congress requiring automatic couplers cannot be extended to cars employed only in commerce between points in the state.—Rio Grande Southern R. Co. v. Campbell, Colo., 96 Pac. Rep. 986.

30. **Constitutional Law**—Due Process of Law.—A city order for the original construction of a city improvement at the cost of abutting owners held not to deprive such owners of their property without due process of law.—Guilfoyle's Ex'r v. City of Maysville, Ky., 112 S. W. 666.

31.——Equal Protection of Laws.—To penalize good-faith resistance to the enforcement of laws by judicial interference is unreasonble, and violates the constitutional guaranty to every person of a certain remedy in the law for injuries to person and property.—Bonnett v. Vallier, Wis., 116 N. W. Rep. 885.

32.——Obligation of Contracts.—Act December 17, 1907, establishing a depositor's guaranty fund, is not in violation of Const. art. 2, sec. 15, providing that no law impairing the obligation of contracts shall ever be passed.—Noble State Bank v. Haskell, Okla., 97 Pac. Rep. 590.

33.——Pollution of Stream.—The alleged right of a riparian proprietor to pollute a stream is not a privilege or immunity which he enjoys as a citizen of the United States, as distinguished from his rights as a citizen of the state in which the land and stream are situated.—Commonwealth v. Emmers, Pa., 70 Atl. Rep. 762.

34. **Contracts**—Liens.—A contractor cannot recover in an action on a contract not filed and recorded as required by the mechanics' lien law, unless there is a finding of the reasonable value of the work.—Los Angeles Pressed Brick Co. v. Higgins, Cal., 97 Pac. Rep. 420.

35.——Modification.—Where the original contract is executory on both sides, either in whole or in part, and the parties, in making a new contract, waived or released any liability under the original contract, such waiver is a consideration for the promise of the party whose liability is thus released.—Pyre v. Kalbaugh, Utah, 97 Pac. Rep. 331.

36. **Conversion**—Wills.—A direction by testatrix to her executor to sell all her real estate, and distribute the proceeds among those who would be entitled thereto under the intestate laws, held not to work an equitable conversion.—In re Glentworth's Estate, Pa., 70 Atl. Rep. 756.

37. **Corporations**—Contracts Ultra Vires.—A purchase by one corporation of stock of another as an investment when foreign to the objects of the corporation and not authorized by law is ultra vires and the receipt of dividends will not estop it from availing itself of the defense that

the contract was void.—Vandagrift v. Rich Hill Bank, U. S. C. C. of App., Eighth Circuit, 163 Fed. Rep. 823.

38.——Creditor's Suit.—A creditor's action may be maintained in the courts against a foreign corporation to preserve its property within the jurisdiction to pay claims of creditors as in the case of domestic corporation.—Lehr v. Murphy, Wis., 116 N. W. Rep. 893.

39.——Dividends.—The net income of a corporation for dividend purposes cannot be determined until all taxes, depreciation, maintenance, and up-keep expenditures have been deducted.—People v. State Board of Tax Com'rs, 112 N. Y. Supp. 392.

40.——Issue of Stock as Fully Paid.—Where directors of a corporation issue stock as fully paid up, and there is no fraud, held that stockholders cannot attack the transaction.—O'Dea v. Hollywood Cemetery Ass'n, Cal., 97 Pac. Rep. 1.

41.——Promoters.—Persons conspiring with promotors of a corporation to induce it to purchase property at a price in excess of that agreed to by the owner held liable equally with the promoters for secret profits made on the sale of the property to the corporation.—Lomita Land & Water Co. v. Robinson, Cal., 97 Pac. Rep. 10.

42.——Speculating in Options.—Directors held incapable of binding a corporation by any ratification of transactions in future by its general manager contrary to the by-laws.—Hoffman v. Farmers' Co-op. Shipping Ass'n, Kan., 97 Pac. Rep. 440.

43. **Counties**—Relocation of County Seat.—The people, either through the Constitution or by statute, have authority to provide for the location, relocation, or removal of county seats.—City of Pond Creek v. Haskell, Okla., 97 Pac. Rep. 338.

44. **Criminal Evidence**—Admissions to Prevent Continuance.—Where the prosecution admitted, to avoid a continuance, that an absent witness would, if present, testify to the facts as averred in the affidavit for a continuance, the prosecution might contradict the affidavit by other testimony and show its falsity.—Howerton v. Commonwealth, Ky., 112 S. W. Rep. 606.

45.——Opinions.—Evidence held insufficient to show that accused was insane at the time of his conviction of larceny. An opinion as to accused's insanity is entitled to little weight, where the witnesses are not experts, and do not testify to acts showing insanity.—Smith v. Commonwealth, Ky., 112 S. W. Rep. 615.

46. **Criminal Law**—Review on Appeal.—A statutory appeal from a judgment of conviction and from an order denying a new trial held to clothe the Supreme Court with power to review every question affecting the right of accused, providing the statutes are substantially followed.—State v. Preston, Nev., 97 Pac. Rep. 388.

47. **Criminal Trial**—Arraignment.—Though accused can waive his right to have the charge against him read and to have his plea entered, such waiver cannot be inferred, and, where the statute has been disregarded, the burden is upon the state to show such a waiver.—Essary v. State, Tex., 111 S. W. Rep. 927.

48.——Error in Admission of Evidence.—It is the rule in the federal courts that where a party persisted in putting in testimony which was objected to, and the admission of which was error, the error is fatal if the testimony was or might have been prejudicial.—Alkon v. United States, U. S. C. C. of App., First Circuit, 163 Fed. Rep. 810.

49. **Customs and Usages**—Validity.—If a part of a custom would be valid if it stood alone, it will be invalid when another part of the entire custom of which it forms a part was invalid.—Deadwyler & Co. v. Karow & Forrer, Ga., 62 S. E. Rep. 172.

50. **Damages**—Breach of Contract.—The extent of a possible future loss, to be paid in the event of a breach of contract, may be agreed upon in advance, where the resulting damages are uncertain and the amount fixed is reasonable.—St. Louis & S. F. R. Co. v. Gaba, Kan., 97 Pac. Rep. 435.

51. **Death**—Action for Wrongful Death.—The Minnesota statute giving a right of action for wrongful death for the benefit of the next of kin of the deceased, as construed by the Supreme Court of the State, includes among its beneficiaries a nonresident alien having the prescribed relationship.—Mahoning Ore & Steel Co. v. Blomfelt, U. S. C. C. of App., Eighth Circuit, 163 Fed. Rep. 827.

52. **Deeds**—Designation of Parties.—It is not necessary that a grantee in a deed be mentioned by name, and, where the designation is sufficient to identify the person intended, the deed is effectual.—Clark v. Northern Coal & Coke Co., Ky., 112 S. W. Rep. 629.

53. **Easements**—Obstruction.—The erection of gates by the owner of land across which plaintiff had an easement to construct and maintain an irrigation canal held not to interfere with the reasonable enjoyment of the easement, so as to preclude a contrary finding.—Utah-Idaho Sugar Co. v. Stevenson, Utah, 97 Pac. Rep. 26.

54. **Elections**—State Central Committee.—A party state committee or state convention held powerless to either make regulations in violation of law, or confer privileges on persons not lawfully elected, or to deny privileges to persons lawfully elected.—Walling v. Landson, Idaho, 97 Pac. Rep. 396.

55. **Election of Remedies**—Acts Constituting.—Where fraudulent acts which induced the making of a contract are discovered by the defrauded party, and he acts in affirmance of the contract with knowledge of the facts or takes steps inconsistent with the non existence of the contract, he cannot be heard to say that he did not intend to waive.—Pfeiffer v. Marshall, Wis., 116 N. W. Rep. 871.

56. **Eminent Domain**—Acquisition of Land for Streets.—Where land is taken for highway purposes, the title acquired will, in the absence of a statute to the contrary, be limited to the acquisition of a general easement of passage.—People v. Common Council of City of Gloversville, 112 N. Y. Supp. 387.

57. **Executors and Administrators**—Exceptions Account.—A surcharge against an executor is an adjudication which cannot be made without notice to the executor and an opportunity to be heard.—In re Stitzel's Estate, Pa., 70 Atl. Rep. 749.

58.—Purchase by Administrator.—Persons interested in an estate are not confined to the remedy of avoiding a purchase by the administrator at his own sale, but they may elect to ratify the sale, and hold the representative for the value

or price.—Stuckey v. Lockard, Ark., 112 S. W. 747.

59.——Sale of Land to Pay Debts.—A minor remainderman having been properly represented by guardian ad litem in an action to sell land to pay testatrix's debts, as to his interest, the judgment ordering a sale is presumed to have been proper, in the absence of a showing to the contrary.—Reaves v. Baker, Ky., 112 S. W. Rep. 609.

60. **Federal Courts**—Jurisdiction.—A circuit court of the United States is without jurisdiction of an action brought by the assignee of a chose in action, even though plaintiff and defendant are citizens of different states, or one is an alien, unless plaintiff's assignor could have maintained his suit in the same jurisdiction.—Tierney v. Helvetia Swiss Fire Ins. Co., U. S. C. C., E. D. N. Y., 163 Fed. Rep. 82.

61. **Fire Insurance**—Interest of Third Persons.—A policy issued to a railroad company held not to cover the interest of the owner of flour held by the railroad company as a warehouseman, for the loss of which the railroad company was not liable.—Washburn-Crosby Co. v. Home Ins. Co., Mass., 85 N. E. Rep. 592.

62.——Knowledge of Agent.—Knowledge of insurance agents that a manufacturing plant in which they were interested was not in operation when they insured the same held not chargeable to the insurer.—Home Ins. Co. v. North Little Rock Ice & Electric Co., Ark., 111 S. W. Rep. 994.

63. **Fish**—Ponds and Lakes in New Hampshire.—Under the rule established by decision in New Hampshire which will be followed by the federal courts, there can be no exclusive right of fishing in a lake or great pond, at least unless by legislative grant.—Percy Summer Club v. Astle, U. S. C. C. of App., First Circuit, 163 Fed. Rep. 1.

64. **Franchises**—Validity.—The validity of a franchise granted either directly by the state or through the medium of the city council to a street railway can only be questioned in a direct action by the state in the nature of quo warranto.—State v. Milwaukee Electric Ry. & Light Co., Wis., 116 N. W. Rep. 900.

65. **Good Will**—Use of Firm Name.—On a sale of the good will of a firm, the purchaser is exclusively entitled to the right to use the firm name, subject only to the limitations expressed in Rev. Laws, c. 72, sec. 5.—Moore v. Rawson, Mass., 85 N. E. Rep. 586.

66 **Health**—Tenement Houses.—A general police regulation as to the construction and maintenance of tenement houses, rendering it impracticable to safely comply therewith, in the absence of any official approval of plans and specifications in advance and not providing for any such approval, is unreasonable.—Bonnett v. Vallier, Wis., 116 N. W. Rep. 885.

67. **Homicide**—Manslaughter.—Where the jury believe beyond a reasonable doubt that accused has been proven guilty, but have a reasonable doubt whether he has been proven guilty of murder or manslaughter they should find him guilty of manslaughter.—Combs v. Commonwealth, Ky., 112 S. W. Rep. 658.

68.——Sufficiency of Evidence.—Where the testimony of the commonwealth, if true, justified a conviction, a verdict of guilty was supported by the evidence, notwithstanding the conflicting evidence of accused.—Blanton v. Commonwealth, Ky., 112 S. W. Rep. 594.

69. **Husband and Wife**—Estoppel.—A wife who was a party plaintiff to a suit, and who permitted an amendment allowing her rights to be asserted in the name of the husband, held bound thereby, so that defendant could not complain.—Mount Nebo Anthracite Coal Co. v. Martin, Ark., 111 S. W. Rep. 1002.

70.——Infancy in Action for Maintenance.—In a suit by a wife against her husband for support of herself and child, the husband's plea of infancy is unavailing.—Pendleton v. Pendleton, Ky., 112 S. W. Rep. 674.

71.——Wife Sued as Feme Sole.—A judgment is valid when obtained against a married woman sued as a feme sole and in her maiden name, particularly on any contract made in such name. —Emery v. Kipp, Cal., 97 Pac. Rep. 17.

72. **Indictment and Information**—Sufficiency. —An indictment charging a statutory crime, defined by the statute itself, in the language of the statute, is sufficient without using the words "feloniously," or "with felonious intent."—Howerton v. Commonwealth, Ky., 112 S. W. Rep. 606.

73. **Injunction**—Diversion of Water.—Injunction to prevent diversion of water to the detriment of a prior appropriator operates in personam, and, where personal service has been had, the court can award an injunction entitled to full faith and credit in the courts of every other state.—Taylor v. Hulett, Idaho, 97 Pac. Rep. 37.

74.——Persons Not Parties.—While a person not a party to a strike injunction is not strictly liable for violation of the injunction, he is nevertheless punishable for contempt, if, knowing of the injunction, he aids or abets its violation, or sets the known command of the court at defiance.—Garrigan v. United States, U. S. C. C. of App., Seventh Circuit, 163 Fed. Rep. 16.

75. **Intoxicating Liquors**—Grant of License.— The discretion of the excise board of a city as to granting licenses extends to limiting the number of licenses which it will issue within the city as well as the number that will be granted for any particular purpose.—In re Juggenheimer, Neb., 116 N. W. Rep. 966.

76. **Judges**—Liability of County Judge.—A county judge held liable for failing to require a guardian to make a settlement and to examine into the solvency of his securities, as required by Ky. St. 1903, secs. 1065, 1068.—Cornelison v. Million, Ky., 112 S. W. Rep. 654.

77. **Judgment**—Process to Sustain.—In a wife's suit against her husband to compel support, in which the husband, being out of the state, is only constructively served, a personal judgment against him is not possible, under Civ. Code Prac. § 419.—Pendleton v. Pendleton, Ky., 112 S. W. Rep. 647.

78. **Landlord and Tenant**—Growing Crops.— A tenant who refused to surrender possession at the end of his term, and who unlawfully withheld possession, and planted a crop, was properly deprived of the crop, on the owner sequestrating the land and taking possession thereof before the crop had been severed from the land.—Duncan v. Jouett, Tex., 111 S. W. Rep. 981.

79.——Option to Purchase.—A covenant in a lease with the option of the lessee to purchase for a specified sum, not to let or assign the lease or any part thereof without the consent of the lessor held to include the option to pur-

chase.—Behrens v. Cloudy, Wash., 97 Pac. Rep. 450.

80. **Limitation of Actions**—Cause of Right of Action.—In an action by an administrator for money converted after intestate's death, but before the plaintiff's appointment, cause of action held not to accrue so that limitations ran against it until the administrator was appointed.—Root v. Lathrop, Conn., 70 Atl. Rep. 614.

81.——Agricultural Association.—Property held in trust by a district agricultural association being property held by a public agency for a public use, the statute of limitations does not run against an action to recover such property.—Sixth Dist. Agr. Ass'n v. Wright, Cal., 97 Pac. Rep. 144.

82.——Discovery.—Limitations did not begin to run against an administratrix's liability for breaches of trust by her intestate until the right of action accrued on discovery of the fraud.—Russel v. Huntington Nat. Bank, U. S. C. C. of App., Fourth Circuit, 162 Fed. Rep. 868.

83. **Literary Property**—Infringement of Rights.—A motion for a preliminary injunction to restrain the further sale of volumes of a law cyclopedia containing an article written principally by complainant, in a form which it was alleged would cause irreparable injury to complainant's reputation as a law writer, denied.—Chamberlayne v. American Law Book Co., U. S. C. C., E. D. N. Y., 163 Fed. Rep. 858.

84. **Maritime Liens**—Advances Made in Foreign Port.—Advances made to the master and managing owner of a fishing schooner in a neighboring port of another state without inquiry as to their necessity, and not shown to have been needed or used for necessary equipment of the vessel, held not to give a right to a maritime lien.—The Emma B., U. S. D. C., D. N. J., 162 Fed. Rep. 966.

85. **Master and Servant**—Assumed Risk.—In an action by a 16 year old servant for injuries sustained from slipping on a piece of rock on defendant's car track, the lights along the track being out, plaintiff held to have assumed the risk of injury from such cause.—Cook v. United States Smelting Co., Utah, 97 Pac. Rep. 28.

86.——Assumption of Risk.—An inexperienced man hired to pump on a barge which was discharging a cargo of coal, and who was drowned by the capsizing of the barge through unseaworthiness, held not to have assumed the risk of which he was not warned and had no means of knowledge, and the owner held liable for his death.—Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., U. S. D. C., E. D. Pa., 162 Fed. Rep. 912.

87.——Electricity.—In an action against an electric company for the death of an employee killed by electricity while trimming a lamp which had an alleged defective hood, evidence that other hoods on the company's line were defective was improperly received.—Gardner v. Schenectady Ry. Co., 112 N. Y. Supp. 369.

88.——Injury to Servant.—Where defendant maintained a heavily charged electric wire over the corrugated iron roof of its ore house, defendant was bound to so insulate the wire that its servants likely to come in contact therewith would not be injured.—Colusa Parrot Mining & Smelting Co. v. Monahan, U. S. C. C. of App., Ninth Circuit, 162 Fed. Rep. 276.

89.——Injury to Servant.—An employee of a mining company engaged in operating cars held to have assumed the risk of injury from the couplers in use when they were in good repair.—Mahoning Ore & Steel Co. v. Blomfelt, U. S. C. C. of App., 163 Fed. Rep. 827.

90.——Liabilities for Injuries to Third Persons.—Where a servant with his master's consent, takes the latter's automobile, and while using it for purposes of his own negligently runs into and injures a person, the master is not liable.—Cunningham v. Castle, 111 N. Y. Supp. 1057.

91.——Negligence of Fellow Servants.—A servant whose duties required him to select sacks of coffee from piles of sacks laid in rows, and who knew the tendency of the piles to settle and bulge out, held to have assumed the risk of the sacks falling.—Bradley v. James H. Forbes Tea & Coffee Co., Mo., 111 S. W. Rep. Rep. 919.

92.——Running Trains Backward at Night.—The running of a railroad train at night a distance of 84 miles backward with no headlight to light the track in front of it subjects the trainmen to extra and unusual hazard and requires from the railroad company at whose orders it is done a degree of care and caution commensurate with such extra risk to keep the track free from obstructions.—Norfolk & W. Ry. Co. v. Gardner, U. S. C. C. of App., Fourth Circuit, 162 Fed. Rep. 114.

93.——Vice Principals.—Negligence of a foreman in giving orders to the engineer to drop a log when it was several feet above the truck on which it was being loaded, causing the death of an employee, held negligence of a vice principal.—Gould Const. Co. v. Childers' Adm'r, Ky., 112 S. W. Rep. 622.

94. **Mechanic's Liens**—Contracts for Work on Wife's Land.—Where a husband contracts for the improvement of his wife's property with one believing him to be the owner, and the wife with knowledge makes no objections, she will be estopped to set up her title in defense to a suit to enforce a contractor's lien.—Harris v. Graham & Bordley, Ark., 111 S. W. Rep. 984.

95.——Persons Entitled to Lien.—That a member of a partnership is surety on the bond of a building contractor held not to debar the firm of which he is a member from the right to a mechanic's lien on the building for labor or materials furnished.—Burnett v. Glas, Cal., 97 Pac. Rep. 423.

96.——Rights of Third Person.—Equities of a third person cannot be adjudged in a proceeding to foreclose a mechanic's lien, unless such person intervenes and becomes a party to the proceeding.—Pagnacco v. Faber, Pa., 70 Atl. Rep. 754.

97. **Mortgages**—Foreclosure.—A finding that mortgaged property belonged to the mortgagor, or, if it was his wife's separate property, plaintiff did not know that fact, authorized a judgment of foreclosure of the mortgage.—Goode v. Pierce, Tex., 112 S. W. Rep. 688.

98. **Municipal Corporations**—Care Required of Pedestrians.—A pedestrian is not bound to refrain from using streets which have been permitted to become out of repair, but is only required to exercise ordinary care in using them.—Holbert v. City of Philadelphia, Pa., 70 Atl. Rep. 746.

99.——Constitutional Law.—The Legislature has the right to change the boundaries of a municipality without apportioning its indebtedness and providing for the enforcement of the liability thereof.—In re Hunter, Minn., 116 N. W. Rep. 922.

100.——Construction of Sidewalks.—The time and manner for improving city streets are solely for the legislative department, and acts of abutting owners in constructing a sidewalk does not deprive a city of its power to order the construction of a sidewalk at the cost of abutting owners as authorized by statute.—Guilfoyle's Ex'r v. City of Maysville, Ky., 112 S. W. Rep. 666.

101.——Defective Streets.—Whether a city was negligent in allowing snow and ice to accumulate in a highway on each side of a railway crossing in such a manner as to make an unnatural hump or ridge on either side of the railroad track held to be a question for the jury.—Johnson v. City of Marquette, Mich., 117 N. W. Rep. 658.

102.——Special Assessments.—In assessing special benefits, the assessing authority must find that the effect of the improvement is to increase the value of the owner's property by weighing the facts tending to show injury, as well as special benefit.—Park City Yacht Club v. City of Bridgeport, Conn., 70 Atl. Rep. 631.

103.——Vacation of Streets.—Where a city annexes territory over which there is a highway theretofore established by the county board, such highway becomes a street and the city council alone may vacate it.—Lee v. City of McCook, Neb., 116 N. W. Rep. 955.

104. **Names**—Right to Change.—At common law one may change his name at will, and sue or be sued in any name in which he is known and recognized.—Emery v. Kipp, Cal., 97 Pac. Rep. 17.

105. **Officers**—Withdrawal of Resignation.—A public officer should not be permitted to vacate an office and then assume it again at will; and this he cannot do as a matter of law, independent of any question of public policy.—State v. Murphy, Nev., 97 Pac. Rep. 391.

106. **Partnership**—Sale of Good Will.—A sale of the good will of a partnership under a dissolution decree, while it carries every advantage belonging to the existing business, leaves the members of the firm at liberty to start a new business of the same kind in competition with the purchaser.—Moore v. Rawson, Mass., 85 N. E. Rep. 586.

107. **Receivers**—Appointment.—Where it was claimed that a receiver was appointed without notice, the court was entitled to take proof that the objecting party had agreed to the proceedings, and this without a trial amendment of the pleadings.—Southwell v. Church, Tex., 111 S. W. Rep. 969.

108. **Religious Societies**—Real Estate.—Real estate having been conveyed to a trustee for a Catholic congregation under Acts 1731 (1 Smith's Laws, p. 192), it was no answer to the congregation's direction to the trustee to convey the property to another that he held the same as bishop of the Roman Catholic Church, and not as trustee for the congregation.—Krauczunas v. Hoban, Pa., 70 Atl. Rep. 740.

109. **Sales**—Action for Price.—Though there may have been a written contract, yet where suit was brought on an open account, and the evidence for the seller showed that he had fully performed, a nonsuit was properly refused.—Alabama Const. Co. v. Continental Car & Equipment Co., Ga., 62 S. E. Rep. 160.

110.——Default of Seller.—Profits which one who installed a ginnery hoped to make in a season held too speculative to constitute a measure of damages for failure to deliver machinery as contracted for.—Standard Supply Co. v. Carter & Harris, S. C., 62 S. E. Rep. 150.

111. **Shipping**—Liability of Vessels Causing Dangerous Swells.—Vessels using a dock cannot be expected to so manage their work as to receive extraordinary swells without harm, and a vessel making such swells, although navigated in the usual manner, is responsible for their effects upon innocent vessel.—The Hendrick Hudson, U. S. D. C., S. D. N. Y., 163 Fed. Rep. 862.

112. **Sunday**—Work of Necessity.—The continuance on Sunday of ordinary sales or deliveries of ice or fresh meat is not a work of necessity in a town, within the exception of the Sunday law. Cr. Code 1902 § 500.—State v. James, S. C., 62 S. E. Rep. 214.

113. **Taxation**—Suit to Determine Validity.—A court cannot enter a valid decree foreclosing a tax lien on property unless it has acquired jurisdiction over the person of the owner by the service of process or notice in some mode prescribed by law or by his appearance, or over the property in rem by its seizure under process.—Ontario Land Co. v. Wilfong, U. S. C. C., E. D. Wash., 163 Fed. Rep. 999.

114. **Title Insurance**—Indemnity.—In an action on a title insurance policy issued to a mortgagee, he having purchased the mortgage for an amount equal to the loan, it was immaterial that the insured, and not a stranger, bid up the mortgage at the sale, and that the only other bidder was the insolvent borrower.—Wheeler v. Equitable Trust Co., Pa., 70 Atl. Rep. 750.

115. **Trade Marks and Trade Names**—Use of Individual Name.—Complainant, being entitled to manufacture and sell patented insole shoes under the name of inventor, held entitled to enjoin such use by the inventor and others manufacturing similar shoes under subsequent patents covering improvements, so as to mislead the public.—Dr. A. Reed Cushion Shoe Co. v. Frew, U. S. C. C. of App., Second Circuit, 162 Fed. Rep. 887.

116. **Trial**—Excessive Verdict.—A verdict for "the sum of ten thousand (10,000.00) and cost of suit" held to authorize the entry of a judgment for $10,000.—Central of Georgia Ry. Co. v. Mote, Ga., 62 S. E. Rep. 164.

117. **Vendor and Purchaser**—Rescission.—Where a contract purchaser of land had been allowed extensions of time for payments, and had been guilty of laches in suing to rescind the contract, in which a foreclosure of his interest was decreed, an allowance of 10 days to pay the amount due held not an unjustly short limit of time.—Kornblum v. Arthurs, Cal., 97 Pac. Rep. 420.

118. **Waters and Water Courses**—Supplying Water for Domestic Purposes.—One receiving from a company, which also supplied water for domestic purposes, water for a boiler used in a laundry, held required to provide safety appliances for the escape of steam from the boiler.—Bouri v. Spring Valley Water Co., Cal., 97 Pac. Rep. 530.

119.——Surface Waters.—Defendant held not liable for damages caused by surface waters being diverted onto plaintiff's lot by defendant's raising and filling in his own lot.—Mehornay v. Foster, Mo., 111 S. W. Rep. 882.

120. **Wills**—Authority to Devise Estate.—Authority to divide an estate in a designated way among legatees given legal estates held not to entitle the executor to possession and control of the estate intermediate the period of division.—Thomas v. Owens, Ga., 62 S. E. Rep. 218.

121.——Construction.—Where the language and intent of a will is clear, it cannot be changed by construction; and testator's intention must be adhered to, even though it leads to the destruction of the will.—Simpson v. Trust Co. of America, 112 N. Y. Supp. 370.

122.——Disqualifying Interest of Witness.—A disqualifying interest of a witness to a will containing religious or charitable bequests, under Act April 26, 1855 (P. L. 332), sec. 11, is an interest either created by the will itself, or by reason of the witness being interested in the legatee institutions.—In re Kessler's Estate, Pa., 70 Atl. Rep. 770.

123. **Witnesses**—Humiliation.—Though a witness may not be required to answer a question that would subject him to a prosecution, the fact that the answer may degrade, disgrace, or humiliate him will not excuse him.—Leach v. Commonwealth, Ky., 112 S. W. Rep. 595.

124.——Privileged Communications.—Under Rev. Laws 1905, sec. 4660, subd. 2, communications made to a clerk of an attorney at law are privileged if made in the course of professional duties.—Hillary v. Minneapolis St. Ry. Co., Minn., 116 N. W. Rep. 933.

125.——Privileged Communications. — Testimony of a physician who at one time professionally treated plaintiff as to facts learned by him while so attending her held properly excluded.—McAllister v. St. Paul City Ry. Co., Minn., 116 N. W. Rep. 917.